Judgment-Proofing Voluntary Sector Organisations from Liability in Tort

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Voluntary sector organisations (VSOs) may use ordinary principles of law to protect themselves from tort liabilities by rendering themselves judgment-proof. There are two viable judgment-proofing systems available to VSOs: (1) charitable purpose trusts, and (2) group structures. Whilst these systems are not fool-proof, they offer significant protection from tort liabilities. However, judgment-proofing may come at a high price to the voluntary sector.

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I. Introduction

Judgment-proofing is the careful structuring of organisations so as to render them men of straw for the purposes of litigation. Whilst typically found in a private sector context, judgment-proofing may also be used by voluntary sector organisations ("VSO"s). Such structures, whilst not fool-proof, provide significant protection to VSOs from tort litigation. However, judgment-proofing may come at significant cost to the voluntary sector.

VSOs may use ordinary principles of law to protect themselves from tort liabilities by rendering themselves judgment-proof. This structuring provides for a form of organisational protection which achieves a similar function to an immunity or damages cap. The existing literature on judgment-proofing is concerned with for-profits and not the voluntary sector. This article is original in considering judgment-proofing from the perspective of the voluntary sector. Judgment-proofing has also not yet been considered from an English law perspective, and this article addresses this gap.

Judgment-proofing may provide significant asset protection for VSOs, and discourage tort claims against VSOs. It allows a VSO to externalise its accident costs, resulting in them falling on victims or individual volunteers. Whilst some scholars have doubted that judgment-proofing is viable, this article demonstrates that it is used in some high-risk industries. This article demonstrates that there are two viable judgment-proofing systems available to VSOs: charitable purpose trusts and group structures. The latter uses incorporation and a symbiotic relationship between a risk generating entity and an asset holding entity designed to insulate the second from risk. There is a risk that both systems may be challenged by courts and legislatures, but doctrinally they should offer significant protection.

Whilst judgment-proofing may provide significant protection to VSOs from tort liabilities, particular problems may arise with it in the voluntary sector context. Judgment-proofing may come at a cost for a VSO or the broader voluntary sector in terms of reputation, and reduced volunteering levels. A lower sector reputation may mean that it is more difficult for the sector to carry out many of its important roles. Judgment-proofing may also encourage greater state regulation, undermining the sector's independence. Legislatures and courts may also intervene in some cases. VSO judgment-proofing, whilst possible, may come at a high price for the sector.

Whilst this article focuses on the English common law, it makes reference to and draws upon material from other common law jurisdictions, and its conclusions apply throughout the common law world.

II. The Voluntary Sector

A. What is the Voluntary Sector?

The International Labour Organization defines voluntary work as non-compulsory activities, "performed willingly and without pay to produce goods or services for others who are outside

the volunteer's family or household".[1] Whilst volunteering may be formal or informal, an organisational requirement distinguishes the voluntary sector from individual acts of altruism.[2]

Given the sector's diversity, it is notoriously difficult to define its parameters.[3] It includes charities, mutuals, co-operatives, and community organisations. The UK's National Council for Voluntary Organisations ("NCVO") describes VSOs as organisations that consist of "people with shared values com[ing] together to achieve something independently of state and markets".[4] The sector is independent of the state and of the for-profit sector. Its purpose is not to make and distribute profits to its owners, and it does not derive its power from the state or exercise public functions.[5] VSOs may have paid workers and/or managers, but to be a VSO, an organisation needs to significantly rely on volunteers as part of its workforce and/or leadership.[6] There is some sector overlap. For instance, VSOs may enter into contractual relationships with the state to deliver services and some mutuals distribute profits to members.[7]

The voluntary sector is diverse in the size, aims, motivations, and activities carried out by VSOs. Whilst the sector's income is dominated by large charities,[8] it extends significantly beyond charities. Not all VSOs exclusively pursue charitable purposes, or have sufficient public benefit to be charitable. Some may also pursue political purposes.

At one extreme, the sector includes large, well-funded, formally-structured entities with international footprints managed by paid employees. Where volunteers are recruited for specific roles, they are trained and directed. This is termed a 'vertical' form of volunteering. At the other extreme are informal, unfunded, unincorporated associations, led by volunteers. All of their activities are undertaken by volunteers. This is termed a 'horizontal' form of volunteering.[9] The combination of the different functions of the sector, varied forms of volunteering, and motives for volunteering make the sector an intrinsically complex social phenomenon.[10]

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[1]International Labour Organization, "Volunteer Work" (28 April 2016), online: *International Labour Organization* <www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/WCMS_470308/lang--en/index.htm>.

[2]Jonathan Garton, *The Regulation of Organised Civil Society* (Oxford: Hart Publishing, 2009) at 37.

[3]Brian Dollery & Joe Wallis, *The Political Economy of the Voluntary Sector* (Cheltenham, UK: Edward Elgar Publishing, 2003) at 2-4; Alison Dunn, "Introduction" in Alison Dunn, ed, *The Voluntary Sector, the State, and the Law* (Oxford: Hart Publishing, 2000) at 1; Garton, *supra* note 2 at 23.

[4]"Independence and Values" (10 June 2012), online: *The National Council for Voluntary Organisations* <www.ncvo.org.uk/policy-and-research/independence-values>.

[5]Richard Best, "Foreword" in Alison Dunn, ed, *The Voluntary Sector, the State, and the Law* (Oxford: Hart Publishing, 2000) at vi; Garton, *supra* note 2 at 21-22, 36.

[6]Jeremy Kendall & Martin Knapp, *The Voluntary Sector in the United Kingdom* (Manchester: Manchester University Press, 1996) at 18.

[7]Garton, *supra* note 2 at 21, 39; *cf.* Kendall & Knapp, *supra* note 6 at 18 (excluding such organisations).

[8]Claire Bénard et al, "The Civil Society Almanac 2018 Summary" (2018) at 10, online (pdf): <data.ncvo.org.uk/documents/11/ncvo-uk-civil-society-almanac-2018.pdf>.

[9]Colin Rochester et al, *Volunteering and Society in the 21st Century* (Basingstoke, UK: Palgrave Macmillan UK, 2010) at 10-13.

[10]Lesley Hustinx, Ram Cnaan & Femida Handy, "Navigating Theories of Volunteering: A Hybrid Map for a Complex Phenomenon" (2010) 40:4 Journal for the Theory of Social Behaviour 410.

B. Role of the Sector

The voluntary sector has a long history in the common law world.[11] The sector carries out functions that other sectors do not.[12] However, the sector does more than simply fill gaps left by other sectors. It also plays an important democratic function, allowing people to find solutions to social problems without needing to rely on the state. It can advocate minority interests, including those of disadvantaged groups,[13] and empower disadvantaged communities through mutual self-help, providing self-determination, and services delivered with a greater level of understanding. The sector's independence from government also means that communities can avoid the stigma associated with receiving government services.[14] Community proximity means that the sector can have greater efficiency and expertise than the state, permitting a more targeted provision of services.[15]

The sector helps to strengthen community ties, enhance social cohesion, and broaden community support networks. It is also an important conduit for altruism. VSOs can contribute towards government accountability and promote citizen involvement in society.[16] VSOs can help shape policy and can speak on behalf of their volunteers and beneficiaries, providing a voice to grassroots concerns.[17] They are often trailblazers, in many cases with the state subsequently following.[18]

C. Scale of the Sector

The scale of the voluntary sector reinforces the importance of considering the viability of judgment-proofing within the sector. The UK has one VSO per 400 people.[19] In 2017-18, it was estimated that 11.9 million people formally volunteered on a regular basis whilst 20.1 million people formally volunteered at least once.[20] The UK has more full time equivalent volunteers than there are paid employees in the construction sector.[21] The Office of National Statistics has estimated that regular volunteering (once a month or more) is worth GBP £23.9 billion per year to the UK (1.5% of the country's GDP).[22] The European Commission

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[11]See *e.g.* Alexis de Tocqueville, *Democracy in America*, translated by Harvey Mansfield & Delba Winthrop (Chicago: University of Chicago Press, 2000) at 489-92.
[12]Burton Weisbrod, "Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy" in Susan Rose-Ackerman, ed, *The Economics of Nonprofit Institutions* (Oxford: Oxford University Press, 1986) at 22-32; *cf.* Lester Salamon & Helmut Anheier, "Social Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally" (1998) 9:3 Voluntas 213; Garton, *supra* note 2 at 54.
[13]Alison Dunn, "Political Activity and the Independence of the Voluntary Sector in Alison Dunn, ed, *The Voluntary Sector, the State, and the Law* (Oxford: Hart Publishing, 2000) at 145 [Dunn, "Political Activity"].
[14]James Douglas, "Political Theories of Nonprofit Organization" in Walter Powell, ed, *The Nonprofit Sector: A Research Handbook*, 1d (New Haven: Yale University Press, 1987) at 50.
[15]Garton, *supra* note 2 at 57-59.
[16]*Ibid* at 71-73; NCVO, "Commission on the Future of the Voluntary Sector, Meeting the Challenge of Change, Voluntary Action into the 21st Century" (NCVO, 1996) at 3-4.
[17]Dunn, "Political Activity", *supra* note 13 at 143-45.
[18]Douglas, *supra* note 14 at 48.
[19]David Kane et al, "The UK Civil Society Almanac 2015 Highlights" (2015) at 12, online (pdf): *The National Council of Volunteer Organisations* <data.ncvo.org.uk/documents/8/ncvo-uk-civil-society-almanac-2015.pdf> (no equivalent calculation in 2018 or 2019 Almanac).
[20]NCVO, "UK Civil Society Almanac 2019, Volunteering Overview" (2019), online: *The National Council of Volunteer Organisations* <https://data.ncvo.org.uk/volunteering/ >.
[21]Andrew Haldane, "In Giving, How Much do we Receive? The Social Value of Volunteering" (Lecture delivered at the Society of Business Economists, London, 9 September 2014) at 5, online (pdf): *Bank for International Settlements* <bis.org/review/r141028c.pdf>.
[22]UK, Office for National Statistics, *Household Satellite Accounts — Valuing Voluntary Activity in the UK* by Rosemary Foster (London: Office for National Statistics, 2013) at 1.

estimates that the UK's volunteer contribution to GDP is between 2-3%.[23] Large voluntary sectors are also found throughout the common law world. For instance, in 2013, it was estimated that 44% of Canadians volunteered for charitable or non-profit organisations, contributing 1.96 billion hours.[24] The value of volunteer services in Canada has been estimated at 2.6% of the country's GDP.[25] In 2014, 31% of Australians volunteered through organisations or groups, contributing 743 million hours.[26] In the US, in 2018, 30.3% of Americans volunteered through an organisation, a total of 77.3 million volunteers, providing an estimated USD $167 billion in services.[27]

D. VSO Organisational Form

As we have seen above, an organisational requirement distinguishes the voluntary sector from acts of individual altruism. The legal forms available to the organisation depend on whether a VSO's objects are charitable. An incorporated VSO may take the form of a company limited by guarantee, a company limited by shares, a charitable incorporated organisation, an industrial and provident society, a friendly society, a community interest company, or a corporation. An unincorporated VSO may take the form of a trust or an unincorporated association.[28] The form adopted by a VSO may change over time. Many organisations start as unincorporated associations and later incorporate as their activities and potential liabilities expand.[29] The VSO may also consist of one or more entities and a mix of legal forms.

III. Tort Law and the Voluntary Sector

The voluntary sector delivers significant services and is a key plank in government policy across the common law world. It is therefore odd that the sector has attracted little attention from Commonwealth legal scholars[30] and no attention from English tort scholars.[31] Some limited attention has been paid in relation to torts and the voluntary sector in the US, Canada, Ireland, and Australia.[32] The purpose of this section is not to reinforce compensation culture

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[23]UK, Education, Audiovisual and Culture Executive Agency, *Volunteering in the European Union* (Brussels: GHK, 2010) at 11.
[24]Martin Turcott, *Volunteering and Charitable Giving in Canada* (Ontario: Statistics Canada, 2015) at 3.
[25]The Conference Board of Canada, "The Value of Volunteering in Canada" (2018) at 6, online (pdf): <volunteer.ca/vdemo/Campaigns_DOCS/Value%20of%20Volunteering%20in%20Canada%20Conf%20Board%20Final%20Report%20EN.pdf>.
[26]Australian Bureau of Statistics, Media Release, 4159.0, "General Social Survey: Summary Results, Australia, 2014" (30 June 2015), online: *Australian Bureau of Statistics* <www.abs.gov.au/ausstats/abs@.nsf/mf/4159.0>.
[27]Corporation for National and Community Service, "Volunteering in US Hits Record High" (13 November 2018), online: *Corporation for National and Community Service* <www.nationalservice.gov/newsroom/press-releases/2018/volunteering-us-hits-record-high-worth-167-billion>.
[28]Con Alexander et al, *Charity Governance,* 2d (Bristol, UK: Jordan Publishing, 2014) at 17-8.
[29]William Henderson, Jonathan Fowles & Julian Smith, eds, *Tudor on Charities,*10d (London, UK: Thomson Reuters UK, 2015) at 330-31.
[30]Notable exceptions include the work of Debra Morris and Jonathan Garton; the fact that tort may play a role in regulating the externalities of the voluntary sector is alluded to by Garton, *supra* note 2 at 100.
[31]Save the author's own work, see *e.g.* Phillip Morgan, "Recasting Vicarious Liability" (2012) 71:3 Cambridge Law Journal 615; see also Phillip Morgan, "Vicarious Liability and the Beautiful Game — Liability for Professional and Amateur Footballers?" (2018) 38 Legal Studies 242.
[32]See *e.g.* Jeffrey Kahn, "Organizations' Liability for the Torts of Volunteers" (1985) 133:6 University of Pennsylvania Law Review 1433; Kenneth Biedzynski, "The Federal Volunteer Protection Act: Does Congress Want to Play Ball?" (1998-1999) 23:2 Seton Hall Legislative Journal 319; Brenda Kimery, "Tort Liability of Nonprofit Corporations and their Volunteers, Directors, and Officers: Focus on Oklahoma" (1997-1998) 33 Tulsa Law Journal 683; Daniel Barfield, "Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?" (1994-1995) 29 Valparaiso University Law Review 1193;

concerns, but rather to briefly illustrate that tort does play a role within the voluntary sector, and it is not imprudent for VSOs to consider the management of liability risks.

The activities of VSOs may create tort litigation risks. Although within the UK official data as to the number of voluntary sector tort claims is not available,[33] it is possible to identify English tort cases where VSOs are the defendants. These cases include those where the VSO is alleged to be in breach of a direct duty to the victim or that the VSO is vicariously liable for the torts of its volunteers or employees.[34] The actions against VSOs include claims as diverse as direct claims in negligence,[35] occupier's liability,[36] and vicarious liability for a volunteer's negligence[37] or for sexual abuse torts.[38] Similar cases may also be identified throughout the common law world. Within the US, it is possible to identify a large number of tort cases in which VSOs are sued. The causes of action are broad and include nuisance, conversion, negligence, occupier's liability, defamation, and vicarious liability for both negligence and intentional torts.[39] VSOs have also been defendants to tort actions in Australia[40] and Canada.[41] With sexual abuse torts, VSOs throughout the common law world, particularly churches and those involved in children's activities or residential care, have faced

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Andrew Popper, "A One-Term Tort Reform Tale: Victimizing the Vulnerable" (1998) 35 Harvard Journal on Legislation 123; Margaret H Ogilvie, "Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law" (2004) 4:2 Oxford University Commonwealth Law Journal 167; Myles McGregor-Lowndes & Linh Nguyen, "Volunteers and the New Tort Reform" (2005) 13:1 Torts Law Journal 41; Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (Dublin: LRC 93-2009).

[33]Ministry of Justice, "Social Action, Responsibility and Heroism Bill: Impact Assessment" (2014) at para 9, online (pdf): *UK Ministry of Justice* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319479/sarah-bill-impact-assessment.pdf>.

[34]See *e.g. Vowles v Evans*, [2003] EWCA Civ 318; *Scout Association v Barnes*, [2010] EWCA Civ 1476 [*Barnes*]; *Cattley v St John Ambulance Brigade* (25 November 1988), 87 NJ 1140/1986 c 133 (QBD (Eng)) [*Cattley*]; *Petrou v Bertoncello*, [2012] EWHC 2286 (QB); *Jones v Northampton BC*, Times, 21 May 1990 (CA (Eng)); *Prole v Allen*, [1950] 1 All ER 476 (Assizes (Somerset)); *Horne v RAC Motor Sports Association Limited*, 1989 WL 649997 (CA (Eng)); *Bowen v National Trust*, [2011] EWHC 1992 (QB); *Driver v Painted House Trust*, [2014] EWHC 1929 (QB) [*Driver*]; *Bottomley v Todmorden Cricket Club*, [2003] EWCA Civ 1575 [*Bottomley*]; *Murphy v Zoological Society of London*, Times, 14 November 1962 (QB); *Cole v Davis-Gilbert*, [2007] EWCA Civ 396; *Craddock v Farrer, and the Scout Association*, (Preston CC, 17 Nov 2000); *Morrison v The Scout Association*, (Newtownards CC, 6 Nov 2002); *A v The Trustees of the Watchtower Bible and Tract Society*, [2015] EWHC 1722 (QB) [*Watchtower Bible*].

[35]*Bottomley*, *ibid*.

[36]*Driver*, *supra* note 34.

[37]*Barnes*, *supra* note 34; *Cattley*, *supra* note 34.

[38]*Watchtower Bible*, *supra* note 34.

[39]The cases are too numerous to list; a small number of examples include: *Avenoso v Mangan*, 40 Conn L Rptr 637 (Conn Super Ct 2006); *Sweeney v Friends of Hammonasset*, 140 Conn App 40 (Conn App Ct 2013); *Entler v Koch*, 85 AD (3d) 1098 (NY App Div 2011); *Ayala v Birecki*, 17 Mass L Rptr 175 (Mass Super Ct 2003); *Gaudet v Braca*, 33 Conn L Rptr 200 (Conn Super Ct 2002); *Lomando v US*, 2011 WL 1042900 (NJ Dist Crt 2011); *Waschle ex rel Birkhold-Waschle v Winter Sports, Inc*, 127 F Supp (3d) 1090 (Mont Dist Crt 2015); *Meyer v Beta Tau House Corporation*, 31 NE (3d) 501 (Ind Ct App 2015); *Dogs Deserve Better, Inc v New Mexico Dogs Deserve Better, Inc*, 2016 WL 6396392 (N Mex Dist Crt 2016); *American Produce, LLC v Harvest Sharing, Inc*, 2013 WL 1164403 (Colo Dist Crt 2013); *Harris v Young Women's Christian Association of Terre Haute*, 250 Ind 491 (Ind Super Ct 1968); *McAtee v St Paul's Mission of Marysville*, 190 Kan 518 (Kan Super Ct 1962).

[40]See *e.g. Echin v Southern Tablelands Gliding Club*, [2013] NSWSC 516 (Austl); *Goodhue v Volunteer Marine Rescue Association Incorporated*, [2015] QDC 29 (Austl); *Kennedy v Pender & Narooma Rugby League FC* (8 February 2001) NSWDC (Austl).

[41]See *e.g. Grimmer v Carleton Road Industries Association*, 2009 NSSC 169. See also the notorious *Re Christian Brothers of Ireland in Canada* (2000), 47 OR (3d) 674 (ONCA) [*Christian Brothers*].

high-profile sexual abuse litigation for the acts of their employees, ministers, or volunteers.[42] It is not unknown for such litigation to result in attempts to wind up the defendant VSO and seize its assets to pay claimants.[43]

VSO tort litigation risks may also be enhanced where they contract with the state to replace formerly state-delivered functions[44] or where they respond to new social challenges.[45] However, it is difficult to judge the significance of tort within the voluntary sector. This is not the place to discuss the voluminous literature on whether or not England is in the grip of a compensation culture.[46] Similar debates are also found in other common law jurisdictions for example Australia and Ireland.[47]

Such debates will not be solved by examining statistics of claim rates since culture does not just affect the propensity to sue but also affects the way in which the spectre of liability changes people's behaviour. In examining the interface between tort and the voluntary sector, we also must be more specific and concern ourselves only with the voluntary sector. For instance, a claims culture in road traffic accidents is not necessarily representative of the voluntary sector's experience.

Whilst the reported English cases identified above may not be representative of VSO tort litigation, there is evidence of voluntary sector concerns in relation to tort litigation. The

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[42]See *e.g. Jacobi v Griffiths*, [1999] 2 SCR 570; *John Doe v Bennett*, 2004 SCC 17 [*Doe*]; *JGE v Portsmouth Roman Catholic Diocesan Trust*, [2012] EWCA Civ 938 [*JGE*]; *Various Claimants v Catholic Child Welfare Society*, [2012] UKSC 56 [*Various Claimants*]; Austl, Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (Royal Commission 2017), online (pdf): < www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf>; Paula Giliker, "Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention" (2018) 77:3 Cambridge Law Journal 506; *Manter v Abdelhad*, 32 Mass L Rptr 709 (Mass Super Ct 2014); Timothy Lytton, *Holding Bishops Accountable* (Cambridge, Mass: Harvard University Press, 2008).

[43]See *e.g. Christian Brothers*, *supra* note 41. For an American account see Lytton, *ibid*.

[44]Debra Morris, "Charities and the Big Society: A Doomed Coalition?" (2012) 32:1 Legal Studies 132 at 138; see also UK, Charity Commission for England and Wales, *Charities and Public Service Delivery: An Introduction and Overview (CC37)* (Charity Commission, 2012).

[45]John Plummer, "Premium Issue for the Sector" *Third Sector* (21 February 2011), online: <www.thirdsector.co.uk/premium-issue-sector/finance/article/1055677>.

[46]See Richard Lewis & Annette Morris, "Challenging Views of Tort: Part II" (2013) Journal of Personal Injury Law 137; Richard Lewis & Annette Morris, "Tort Law Culture: Image and Reality" (2012) 39:4 Journal of Legal Studies 562; UK, HM Government, *Common Sense Common Safety* (Report) by Lord Young (London: Cabinet Office, 2010) [Lord Young, *Common Sense*]; Richard Lewis, "Compensation Culture Reviewed: Incentives to Claim and Damages Levels" (2014) Journal of Personal Injury Law 209; Annette Morris, "'Common Sense Common Safety': the Compensation Culture Perspective" (2011) 27 Journal of Professional Negligence 82; James Goudkamp, "The Young Report: An Australian Perspective on the Latest Response to Britain's 'Compensation Culture'" (2012) 28 Journal of Professional Negligence 4; Richard Lewis, Annette Morris & Ken Oliphant, "Tort Personal Injury Claims Statistics: Is there a Compensation Culture in the United Kingdom?" (2006) 14 Torts Law Journal 158; Annette Morris, "The 'Compensation Culture' and the Politics of Tort" in TT Arvind & Jenny Steele, eds, *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013) at 57-79; Annette Morris, "Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury" (2007) 70:3 Modern Law Review 349; Kevin Williams, "State of Fear: Britain's 'Compensation Culture' Reviewed" (2005) 25 Legal Studies 499.

[47]David Ipp, "The Politics, Purpose and Reform of the Law of Negligence" (2007) 81 Australian Law Journal 456; David Ipp, "Policy and the Swing of the Negligence Pendulum" (2003) 77 Australian Law Journal 732; Austl, Commonwealth, Law of Negligence Review Panel, *Review of the Law of Negligence: Final Report* by David Ipp (Canberra: Commonwealth of Australia, 2002); Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (Dublin: LRC 93-2009).

sector is increasingly aware of risks.[48] Within the UK, some VSOs have expressed concerns about tort's impact on their operations[49] and fears as to risks or liabilities.[50] There is reference to voluntary sector tort fears in both Lord Young's report[51] and Lord Hodgson's report.[52] However, whilst both reports widely consulted within the voluntary sector, and Lord Hodgson was the then President of the NCVO and his report task force included leading figures from the sector, the findings of both reports on this issue are given without any evidential support. However, one UK survey notes that 5% of the surveyed VSOs have had insurance or legal claims against volunteers or trustees.[53]

There is also evidence that the voluntary sector responds to tort litigation risks. Schwartz's study revealed that the removal of, or reduction in, charitable immunity from torts in the US, combined with increasing insurance rates, led to behavioural changes in the voluntary and non-profit sector.[54] Surveys within the US have also demonstrated that potential liability reduces charitable activity and that liability risks can influence the provision and delivery of non-profit organisations services.[55] Further, there is evidence that charitable hospitals have increased their charges in response to the removal of charitable immunity.[56] There is also some evidence from Ireland that liability and insurance issues have caused some volunteer services to close.[57] Empirical research conducted on behalf of the UK's Cabinet Office shows that the risk of liability impacts on volunteering levels .[58] Similar evidence has also been

[48]Katherine Gaskin, *On the Safe Side Risk, Risk Management and Volunteering* (England: Volunteering England and The Institute for Volunteering Research, 2006); Alex Blyth, "Risk Management: Occupational Hazards" *Third Sector* (27 July 2005); Gracia McGrath, Opinion, "Are Legal Concerns Affecting Volunteer Numbers?" *Third Sector* (17 August 2005), online: <www.thirdsector.co.uk/opinion-hot-issue-legal-concerns-affecting-volunteer-numbers/article/620049>.

[49]See generally UK House of Commons debates on the *Promotion of Volunteering Bill* (Bill 18 of 2003-04), *e.g.* HC Deb (5 March 2004) cols 1149-1200.

[50]"We continue to get a lot of calls from charities and individual volunteers about risk and liability. The chances of any action being taken against them are very low but there is clearly a great concern about risk" per Justin D Smith, NCVO Executive Director for Volunteering and Development, quoted in UK, House of Commons Library, *Social Action, Responsibility and Heroism Bill* (Research Paper 14/38, 2014) at 26; see also Sport England, "Sports Volunteering in England in 2002" (July 2003) at 71-2, 146-147, online (pdf): <sportengland.org/media/3617/valuing-volunteering-in-sport-in-england-final-report.pdf>.

[51]Lord Young, *Common Sense*, *supra* note 46 at 23.

[52]UK, Red Tape Task Force, *Unshackling Good Neighbours* (London: Cabinet Office, 2011) at 8 (Chair: Lord Hodgson), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62643/unshackling-good-neighbours.pdf>.

[53]Gaskin, *supra* note 48 at 4, 12.

[54]Gary Schwartz, "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?" (1994) 42 UCLA Law Review 377 at 413.

[55]Charles Tremper, "Compensation for Harm from Charitable Activity" (1991) 76 Cornell Law Review 401 at 417-18.

[56]Bradley Canon & Dean Jaros, "The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity" (1979) 13 Law & Society Review 969; *cf.* Gregory Caldeira, "Changing the Common Law: Effects of the Decline of Charitable Immunity" (1981-82) 16:4 Law & Society Review 669.

[57]I, Seanad Éireann Deb (30 June 2011), vol 209, no 2, Civil Law (Miscellaneous Provisions) Bill 2011: Second Stage, at 149 online (pdf): <data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2011-06-30/debate/mul@/main.pdf>.

[58]Natalie Low et al, *Helping Out: A National Survey of Volunteering and Charitable Giving* (London: National Centre for Social Research and the Institute for Volunteering Research for the Third Sector in the Cabinet Office, 2007) at 8, 52.

given in the UK Parliament,[59] and also by a US House of Representatives committee report,[60] and in a detailed US study by Horwitz and Mead.[61]

It is not the purpose of this section to establish that there is a compensation culture problem within the voluntary sector but rather to show that tort does play a role in the voluntary sector, that VSOs have expressed concerns as to liabilities in tort, and that responsible VSOs should consider their liability risks and how to mitigate them. This may also include judgment-proofing.

IV. What is Judgment-Proofing?

The collectability of damages is important in deciding whether or not to bring a claim in tort since judgments for damages against men of straw are of little value. Judgment-proofing is a deliberate technique designed to evade the payment of damages. It involves an entity holding insufficient wealth to meet claims or holding its wealth in a form safe from the enforcement of judgment debts. Thus, whether or not an entity is judgment-proof varies from claim to claim.[62] 'Hard' judgment-proofing is where claimants can only reach nominal assets. 'Soft' judgment-proofing is where claimants can reach substantial assets, but these are insufficient to meet the judgment.[63] Depending on the form of judgment-proofing used, a form of organisational protection can be created which resembles an immunity, or a liability cap.

The primary aim of judgment-proofing is to avoid paying tort damages rather than consensually-created liabilities. The reason is that liability in contract may be preserved through mechanisms such as personal (or third party) guarantees or security interests. Given the centrality of damages claims to the law of tort, it is surprising that judgment-proofing has received no attention in the tort law community other than from law and economics scholars.[64]

V. Why Judgment-Proof?

Judgment-proofing offers an organisation the opportunity to conduct activities whilst also avoiding litigation risks. The extent to which judgment-proofing is used is unclear, and some scholars doubt that it is ever viable or used.[65] However, there is evidence of its use amongst

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[59]UK, HC, Constitutional Affairs Committee, *Compensation Culture* (Third Report of Session 2005-06, 754-1) at 42-43, online (pdf): <publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/754i.pdf>; UK, HC Deb (8 June 2006), col 469 (Julian Brazier); UK, HC Deb (8 June 2006), col 419 (Bridget Prentice).

[60]US, *Volunteer Liability Legislation*, 105th Cong (Washington, DC: US Government Publishing Office, 1997) at 10 (Hon Paul Coverdell).

[61]Jill Horwitz & Joseph Mead, "Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence" (2009) 6:3 Journal of Empirical Legal Studies 585 at 614-15, 627.

[62]Stephen Gilles, "The Judgment-Proof Society" (2006) 63 Washington & Lee Law Review 603 at 608.

[63]Lynn LoPucki, "The Death of Liability" (1996) 106:1 Yale Law Journal 1 at 26, at n 107 [LoPucki, "Death"].

[64]See *e.g.* Steven Shavell, "The Judgment Proof Problem" (1986) 6 International Review of Law & Economics 45; Kyle Logue, "Solving the Judgment-Proof Problem" (1994) 72 Texas Law Review 1375; Richard MacMinn, "On the Judgment-Proof Problem" (2002) 27 Geneva Papers on Risk and Insurance Theory 143; Steven Shavell, "Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem" (2005) 36:1 RAND Journal of Economics 63; Tim Friehe, "A Note on Judgment Proofness and Risk Aversion" (2007) 24 European Journal of Law and Economics 109; Yeon-Koo Che & Kathryn Spier, "Strategic Judgment Proofing" (2008) 39:4 RAND Journal of Economics 926; See "The Case of the Disappearing Defendant: An Economic Analysis" (1983) 132 University of Pennsylvania Law Review 145.

[65]James White, "Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability" (1998) 107 Yale Law Journal 1363; Lynn LoPucki, "Virtual Judgment Proofing: A Rejoinder" (1998) 107 Yale Law Journal 1413; Lynn LoPucki, "The Essential Structure of Judgment Proofing" (1999) 51 Stanford Law Review

professionals,[66] and in high risk industries such as asbestos, [67] tobacco, [68] and shipping.[69] Nevertheless, despite this association with these sectors the potential attraction of judgment-proofing to VSOs is clear. VSOs that may wish to judgment-proof are primarily those likely to face major claims; for instance, those involved in outward bound activities, contact sports, the provision of activities or care of children, those that work with vulnerable groups, and some medical organisations.

Insurance is a mandatory requirement for participation in certain activities,[70] and where the voluntary sector contracts with the state to deliver public services, the state can ensure that tort victims will receive compensation by requiring liability insurance.[71] However, many activities which will be conducted by the voluntary sector, quite rightly, do not require mandatory insurance. Any additional requirement for compulsory insurance will limit these activities and potentially exclude communities and individuals of lesser means from participating in civil society, eroding the democratic role of the sector.

Where a VSO is a charity, the trustees have a duty to protect its assets and resources, including from tort liabilities. Often this duty is discharged through purchasing insurance.[72] However, this is not the only way to discharge this duty. Judgment-proofing as an alternative, or used in combination with insurance, increases in attractiveness where insurance becomes unavailable or expensive. Whilst this assumes responsive premium setting, this has occurred in the context of charities which facilitate children's outdoor activities.[73] There have also been problems in obtaining insurance when an organisation is dealing with a new social problem.[74] This may force the claims of tort victims onto the assets of the organisation. Such depletion of assets may remove essential community services and discourage community activities. The threat of such claims may also discourage the making of large donations to a VSO if the donation will be potentially targeted by tort claimants. From the perspective of a VSO, there may be some value in structuring itself so as to protect itself and its assets in the case of withdrawal of insurance coverage, or a failure to obtain affordable insurance coverage, or from claims which exceed its insurance limit. For example, as noted above, institutional sexual abuse litigation has in some cases endangered the future of the organisation itself. Further, a VSO may wish to expand its activities to deal with emerging

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147 [LoPucki, "Essential Structure"]; Steven Schwarcz, "The Inherent Irrationality of Judgment Proofing" (1999) 52 Stanford Law Review 1; Steven Schwarcz, "Judgment Proofing: A Rejoinder" (1999) 52 Stanford Law Review 77.

[66]Che & Spier, *supra* note 64 at 927.

[67]See *Adams v Cape Industries Plc* (1989), [1990] Ch 433 (CA (Eng)) [*Adams*]. See also Al Ringleb & Steven Wiggins, "Liability and Large-Scale, Long-Term Hazards" (1990) 98:3 Journal of Political Economy 574.

[68]See LoPucki, "Death", *supra* note 63 at 65-66, at nn 274-75.

[69]The well-known practice of one ship companies used to evade sister ship arrest.

[70]See *e.g. Road Traffic Act 1988* (UK), s 143; *Employers' Liability (Compulsory Insurance) Act 1969* (UK).

[71] In the light of *Gwilliam v West Hertfordshire Hospitals NHS Trust*, [2002] EWCA Civ 1041 it is sensible for the public authority to require this; *cf. Glaister v Appleby-in-Westmorland Town Council*, [2009] EWCA Civ 1325.

[72]UK, Charity Commission for England and Wales, *Charities and Insurance (CC49)* (Charity Commission, 2012) at para 1.1.

[73]The Scout Association had its premium increased by 66% in 2004, leading to a curtailment of activities and the closure of some Scout troops who often have their own insurance. The charity Kids had its premium raised by 57%, and Trident Trust, a work placement charity for those aged 18-25, saw its premiums double. David Bamber, "School trips and charities hit by soaring insurance costs" (29 August 2004), online: *The Telegraph* <www.telegraph.co.uk/news/uknews/1470462/School-trips-and-charities-hit-by-soaring-insurance-costs.html>.

[74]Tremper, *supra* note 55 at 429-30.

problems whilst simultaneously protecting its existing operations and assets, particularly where the new area is 'high risk'.

VI. What Judgment-Proofing Mechanisms are Available to VSOs?

Previous judgment-proofing literature concerns for-profits rather than VSOs, and there is *no* literature on judgment-proofing in an English law context. Given that judgment-proofing has primarily been discussed in a US context, we need to draw on this material.

There are two viable techniques through which to judgment-proof a VSO and thus construct organisational protection: the use of charitable purpose trusts and the use of group structures.[75] With both techniques there is a risk that the mechanisms will be challenged in the courts. However, as a matter of doctrinal law, both the use of charitable purpose trusts and group structures should provide significant protection from claims.

VII. Charitable Purpose Trusts

Perhaps due to the focus on for-profits, the US literature on judgment-proofing does not deal with the possibility of using charitable purpose trusts. Such mechanisms are highly suited to creating a judgment-proof structure for VSOs, although a VSO may only use such mechanisms where at least some of its purposes are exclusively charitable. Whilst not all VSOs are charities it may be possible to locate some charitable purposes in a number of VSOs which are not charities.

Where the tort, or the trustee's vicarious liability for the tort of another, is connected with the administration of the trust, the trustee who acts properly has a right of indemnity, and the claimant if need be may stand in the trustee's place and enforce his claim directly again the trust property through subrogation.[76] It is trite law that where an individual trustee commits a tort which is not connected with the administration or purposes of the trust that the assets of the trust are not available to satisfy judgment against the trustee, and that trust assets are not available to the trustee's creditors in the case of the trustee's bankruptcy.[77]

Thus, if an impecunious teacher, who also happens to be a trustee of a charitable trust to provide housing for the homeless, is sued for negligently crashing his bicycle into a pedestrian whilst travelling to work as a teacher, the trust assets are entirely unconnected with the claim and the claimant cannot get their hands on them as there is no right of indemnity. If an individual is a trustee for two separate charitable purpose trusts — the first a trust to provide accommodation for the homeless, and the second a children's educational outward bound trust — the funds of the latter may be targeted by a claimant child who is negligently injured on a hike by a group leader employed by the trustee (by suing the trustee, who can obtain an indemnity from the trust), but the funds of the housing trust are unconnected with this, and may not be targeted.

In both cases, it should make no difference if the trustee is instead a corporate trustee. Nor should it make any difference if the two separate charitable purpose trusts have similar

[75]Utilising secured debt and offshore trusts are unsuitable for VSOs struggling with insurance premiums.
[76]*Bennett v Wyndham*, [1862] 45 ER 1183 (Ch (Eng)).
[77]*Re Pumfrey*, (1882) 22 Ch D 255 (Ch (Eng)) (the creditor's claim against the trust funds is derivative, based on the trustee's own right of indemnity); *Re Johnson*, (1880) 15 Ch D 548 (Ch (Eng)) [*Johnson*] (if there is no right of indemnity, there is no claim); *Ex parte Edmonds*, [1862] 45 ER 1273 (Ch (Eng)).

purposes; for instance, if both are educational charitable purpose trusts. The VSO's assets may thus be partitioned into separate charitable trusts to protect them from claims brought against the VSO. The removal of assets from the VSO to separate trusts may be used to judgment-proof the organisation.

Donations to a non-profit or charity will generally go into the general funds of the organisation and will therefore become potentially available to tort creditors. This is so even if the donor's motive is to benefit a particular cause. However, it is possible to impress the donation with a trust where it is made for a certain purpose. In such a case, the non-profit is obliged to apply the donation to that purpose, and this binds third parties.[78] This will depend on the circumstances in which the donation was solicited or made.[79] Thus, for instance, when an educational VSO solicits donations to sponsor the education of a particular named child in a developing country, the funds may be impressed with a trust that the funds are to be applied to that purpose. However, where acquired assets pass into a VSO's general funds, rather than to separate trusts, the VSO may subsequently create separate charitable trusts to shield these newly acquired assets and judgment-proof the organisation.

Such mechanisms will not involve significant governance changes for many VSOs. For instance, whilst an incorporated charity holds its assets beneficially,[80] and they are thus available to creditors,[81] it is possible, and indeed common, for them to hold particular assets on trust, and it is standard accounting practice for charities to distinguish between income, endowment, and special trusts, which are separately accounted for.[82]

The use of separate trusts means that if the parent organisation is swept away through litigation, the assets in the separate charitable purpose trust are still applied to the charitable purposes since the trust does not fail for the want of a trustee. However, tort creditors can still potentially access that asset where it is the activities of *that* trust that cause their injury. The method of asset partitioning used therefore protects assets from unrelated claims. However, when combined with a group structure (see below) it can also be used to protect the assets from related claims. Nevertheless, as we will see below, controversial litigation in Canada has permitted unrelated tort claims to access trust assets.

In the case of an unincorporated association, judgment-proofing the trust funds may also be attempted by removing a trustee's right to an indemnity from the trust funds. Whilst an express attempt to do this is highly unlikely to be successful, since this right to an indemnity may not be excluded or restricted by the terms of the trust,[83] and few trustees would agree to serve if this were the arrangement. Nevertheless, an attempt to remove the right of indemnity can be attempted via alternative means. This right to an indemnity can be removed by a deliberate trustee default in relation to the trust fund for sums that exceed likely claims.[84] This would, for instance, involve loans from the funds or deliberate breaches of fiduciary duties. Such a deliberate and cynical fraud designed to frustrate a creditor's or future

[78] *Twinsectra Limited v Yardley*, [2002] UKHL 12 at para 76, Lord Millett.
[79] *Charity Commission for England and Wales v Framjee*, [2014] EWHC 2507 (Ch) at para 38, Henderson J.
[80] *Liverpool and District Hospital for Diseases of the Heart v AG*, [1981] Ch 193 (Ch (Eng)). Note individuals holding charitable assets hold them on trust.
[81] *Re Wedgwood Museum Trust Limited (In Administration)*, [2011] EWHC 3782 (Ch) at 281 [*Wedgwood*].
[82] Alexander et al, *supra* note 28 at 156-58, 188-90.
[83] Lynton Tucker, Nicholas Le Poidevin, & James Brightwell, *Lewin on Trusts*, 19d (London: Sweet and Maxwell, 2015) at 834-54; *Trustee Act 2000* (UK), s 31(1).
[84] Note that in *Johnson, supra* note 77, the trustee was in default and was thus not entitled to an indemnity upon which the creditors could use to found their claim.

creditor's equitable derivative claim upon the indemnity is likely to be ignored by courts which are likely to permit the claim to continue. In addition, such a mechanism would expose trustees (many of whom will be volunteers) to personal liability, and in the case of charitable trusts, will additionally attract the attention of the Charity Commission for England and Wales ("Charity Commission"). Few trustees would agree to such a scheme. Further, in addition to this derivative claim upon the indemnity, a tort victim may also have a direct claim against the trust funds in so far as there was unjust enrichment of the funds by the wrong.[85]

Using a separate trust structure may not necessarily be a situation of deliberate judgment-proofing. Legal policy recognises that some assets need to be protected from general creditors. Otherwise a defendant will never acquire them from a third party (such as a donor) in the first place.[86] In fact, the acquisition of this asset or funds would represent a windfall to claimants, and objections to this form of asset protection must be limited.

A. Challenges to Charitable Trust Judgment-Proofing

To understand the level of protection provided to VSOs by judgment-proofing, we also need to examine potential challenges to it. Using more than one charitable purpose trust in order to insulate assets from potential claims is not risk-free. In *Christian Brothers*,[87] which has faced judicial,[88] academic,[89] and legislative[90] disapprobation, the Court of Appeal for Ontario allowed claimants to dip into a charitable purpose trust pot that was entirely unconnected with their claim and, in doing so, departed from traditional trust principles.

In *Christian Brothers*, there were three relevant separate entities: (1) Vancouver College Ltd ("VCL"), a registered charity and a Catholic private school in Vancouver incorporated in 1927; (2) St Thomas More Collegiate Ltd ("STMCL"), a registered charity and Catholic high school in British Columbia incorporated in 1962; and, finally, (3) the Christian Brothers of Ireland in Canada ("CBIC"), incorporated by Act of Parliament in 1962.

CBIC operated schools and orphanages in Canada. Due to claims relating to abuse committed at an orphanage in Newfoundland, it was sought to wind up CBIC so that its assets would be available to compensate the claimants. The question was whether the assets of the two schools were also available in that winding up process to compensate the claimants.

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[85] See *e.g. Whiting v Hudson Trust Company*, 234 NY 394 (NY Ct App 1923).

[86] Examples include retention of title clauses and *Barclays Bank Ltd v Quistclose Investments Ltd*, [1970] AC 567 (HL (Eng)).

[87] *Supra* note 41.

[88] *Rowland v Vancouver College Ltd*, 2001 BCCA 527 at paras 179-83, Braidwood JA, dissenting (majority did not deal with the correctness of the Ontario decision).

[89] Kevin Davis, "Vicarious Liability, Judgment Proofing, and Non-Profits" (2000) 50 University of Toronto Law Journal 407; Timothy Youdan, "Creditor-Proofing Charities: What to do in Light of the Christian Brothers Decisions" (2005) 42 Canadian Business Law Journal 198; Alison Dunn, "Neither Fish nor Fowl? The Use of Charitable Company Assets under English Law" (2005) 42 Canadian Business Law Journal 223 [Dunn, "Neither Fish nor Fowl?"]; Ogilvie, *supra* note 32; Jason Neyers & David Stevens, "Vicarious Liability in the Charity Sector: An Examination of Bazley v Curry and Re Christian Brothers of Ireland in Canada" (2005) 42 Canadian Business Law Journal 371; *cf.* David Wingfield, "The Non-Immunity of Charitable Trust Property" (2003) 119 Law Quarterly Review 44.

[90] The British Columbia, Legislative Assembly following the Trustee Act Modernization Committee, *Report on Creditor Access to the Assets of a Purpose Trust* (BCLI Report No 24, 2003), legislated against the decision via the *Charitable Purposes Preservation Act*, SBC 2004, c 59.

The shares in VCL were held by four individual Christian Brothers in trust for the Christian Brothers of Ireland'. The majority of the shares of STMCL were held by CBIC, with a minority being held by a lay teacher.

For Justice Feldman, giving the leading judgment, the availability of the assets of the two schools followed from a rejection of the doctrine of charitable immunity. The entire corporation is vicariously liable, and all of its property is available to meet a claim, whether it holds it beneficially or holds it on trust.[91] It was therefore unnecessary to examine whether an asset is beneficially owned or 'trust funds'. Justice Feldman considered that there is no need for the claim to relate to particular assets of a corporation for those assets to be made available to meet judgments.[92] Where a charitable corporation has more than one charitable purpose, all assets, and not just those connected with that purpose, are available to meet claims.[93] According to Justice Feldman, it would be contrary to the policy which underlay the rejection of charitable immunity to allow special charitable purpose trusts to be used to segregate assets in order to defeat tort claimants.[94] Justice Doherty, whilst concurring, was more reticent, dealing only with the winding up of a charitable corporation — a final accounting, which looks at the corporation as a "single whole entity".[95]

The decision means that a charitable purpose trust can be wound up for the liability of the trustee, which is unconnected with the administration or activities of the trust.[96] However, a narrower reading can be given that it applies only in the case where the trustee is a charitable corporation. Nevertheless, the decision departed from traditional trust principles and is a "radical break with precedent".[97] However, the critics of the decision fail to distinguish between the two schools such that the decision may be defensible as far as VCL is concerned, in that it was beneficially owned by CBIC, but not STMCL. Neyers and Stevens consider that it abolishes the charitable purpose trust, although it could be confined to apply only where a charitable corporation is the trustee. Further, they state:

> [t]he court speaks of claims against CBIC, as if the corporate patrimony were the only patrimony on the scene. The court largely ignores, or misunderstands, the possibility that CBIC both owned property beneficially and that it was the trustee of two charitable purpose trusts.[98]

A rejection of charitable immunity does not lead to such an outcome. That charitable immunity from tort is not the law in Canada — or England — is not controversial. It follows from the decision in *Mersey Docks and Harbour Board Trustees v Gibbs*[99] that charitable trust assets are potentially available to tort claimants. However, this decision does not deal with the question of whether both sets of assets are available when an individual or charitable corporation holds its own assets, and also holds assets as a trustee as part of a separate charitable purpose trust. That the former assets are available to meet a judgment is

[91] *Christian Brothers*, *supra* note 41 at 82.
[92] *Ibid* at 83.
[93] *Ibid* at 84.
[94] *Ibid* at 28, 82-85.
[95] *Ibid* at 106.
[96] Ogilvie, *supra* note 32 at 191.
[97] Davis, *supra* note 89 at 408, 429.
[98] Neyers & Stevens, *supra* note 89 at 412, 371-81.
[99] (1866) 11 ER 1500 (HL (Eng)).

uncontroversial, but to make the latter assets available is to ignore the existence of the separate trust, and to ignore general principles of the law of trusts.[100]

Where there are two trusts, the trusts may be wholly unrelated and the only thing they may have in common is the identity of a trustee. The fact that a corporate trustee is being wound up should not change matters since "the continued existence of a charitable trust does not depend on the continued existence of the trustee. The trust would continue and, if necessary, the court would appoint a new trustee".[101]

Christian Brothers does not represent the position in England. In English trust law, it is not generally possible to lift the veil of a trust so as to make trust assets available to meet the liabilities of the settlor unless the trust is a sham.[102] Thus, the use of separate charitable purpose trusts to protect assets is still possible.

Nevertheless, even if the English courts were to follow the Ontario courts in *Christian Brothers*, it is still possible to plan around the decision through the use of separate corporations[103] or with charitable purpose trusts where the trustees are not a charitable corporation.[104] In addition, in *Christian Brothers*, the risk generating entity held the shares of the asset holding entities. An alternative structure could avoid this. If the claims had arisen from one of the two schools, apart from the assets of the school in question it is difficult to see how CBIC and its assets could have been targeted,. The problem with the structuring as used in CBIC is that the liability generating organisation owned one of the asset holding organisations and not the other way around. Separate charitable purpose trusts therefore still provide a viable mechanism for judgment-proofing if structured properly.

Whilst such mechanisms may not be suitable for smaller VSOs, despite potential challenges to judgment-proofing structures based on separate charitable purpose trusts they remain viable options for larger concerns. Nevertheless, as the litigation in *Christian Brothers* shows, the use of such structures may still embroil the organisation in complex litigation, and judges may be tempted to re-write the law of trusts where faced with the victims of egregious torts and assets protected through the use of separate trusts. Further, not all VSOs have charitable purposes. Therefore, using charitable trusts is not available as a judgment-proofing strategy for all VSOs.

VIII. Group Structure Judgment-Proofing

Group structure judgment-proofing is potentially available to protect all types of VSOs, not just those with charitable purposes. It involves a relationship between more than one incorporated entity within a group structure: one (X) which holds most of the assets and a second (Y) which generates risks but holds little, if any, assets.[105] Y is owned by X. This system protects the assets of X from Y's judgment creditors since only Y's assets are exposed to claims.

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[100]Davis, *supra* note 89 at 436, 441.
[101]Youdan, *supra* note 89 at 205.
[102]*R v Vickers*, [2010] EWCA Crim 3246 at para 7, Moses LJ; *Larkfield Limited v Revenue and Customs Prosecutions Office, Barnes, and May*, [2010] EWCA Civ 521.
[103]Dunn, "Neither Fish nor Fowl?", *supra* note 89 at 242.
[104]Youdan, *supra* note 89 at 207-11.
[105]LoPucki, "Essential Structure", *supra* note 65 at 149.

Incorporation is available to VSOs, which results in separate legal identity and limited liability.[106] Limited liability means that claims against the company may only be executed against the company's assets, not the assets of shareholders.[107] It also has the advantage of protecting organisational assets from claims brought against the members or volunteers in a personal capacity.[108]

An enterprise may be subdivided into different companies: parent, subsidiary, and sub-subsidiary companies. A subsidiary is a separate legal entity from its parent even if they are managed in a coordinated fashion.[109] This results in asset and liability partitioning. Limited liability also operates within a group of companies.[110] A group structure itself does not render the risk-generating subsidiary company judgment-proof; it merely defeats liabilities which exceed the value of the company assets.[111] To create a judgment-proof entity, the risk generating entity needs to be stripped of assets. Within the for-profit sector, any revenues which are generated by the subsidiary are regularly removed. With a VSO structured into an asset holding parent company and a risk-generating subsidiary company which generates revenue — for instance, by charging for its services — it is also possible to strip the subsidiary of its revenues albeit by different means to the for-profit sector. For instance, an incorporated charity might own a limited company that regularly makes donations to its parent's charitable purposes. Where the subsidiary does not generate revenue, since it delivers its services for free, the structure may operate without any need to strip the subsidiary of revenue.

There is evidence to suggest that this method of judgment-proofing is used by some Canadian charities.[112] Guidance on risk management in charities produced by the Charity Commission also envisages the passing on of risk to a third party, such as a trading subsidiary.[113]

A. Challenges to Group Structure Judgment-Proofing

Group structure judgment-proofing is potentially vulnerable to a number of challenges. Firstly, veil-piercing, which disregards the separate legal identities and looks through the company to its shareholders. Nevertheless, decisions of the Supreme Court of the United Kingdom make it clear that it will be rare,[114] and it is unlikely that veil-piercing would be available in the case of a judgment-proof VSO.[115] In *Adams*,[116] the Court of Appeal of England and Wales ruled that a court is not entitled to pierce the veil, even where the corporate structure has been deliberately created to protect the parent from future liability in tort, by ensuring that such risks fall on a subsidiary. The ability to construct such a structure

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[106]See also UK, Charity Commission for England and Wales, *Charity Types: How to Choose a Structure (CC22a)* (Charity Commission, 2014).
[107]See *Insolvency Act 1986* (UK), s 74(2)(d) [*Insolvency Act*].
[108]Henry Hansmann & Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale Law Journal 387 at 394.
[109]*Adams*, *supra* note 67 at 536, Slade LJ.
[110]*Re Southard & Co Ltd*, [1979] 1 WLR 1198 (CA (Eng)) at 1208, Templeman LJ.
[111]LoPucki, "Death", *supra* note 63 at 21.
[112]Mark Anshan, "Credit Proofing Charity Assets" (30 April 2014), online: *Drache Aptowitzer LLP* <drache.ca/articles/charities-article-archive/credit-proofing-charity-assets/>.
[113]UK, Charity Commission for England and Wales, *Charities and Risk Management (CC26)*, (Charity Commission, 2010) at 17.
[114]*Prest v Petrodel Resources Ltd*, [2013] UKSC 34 [*Prest*]; *VTB Capital Plc v Nutritek International Corp*, [2013] UKSC 5 [*VTB*].
[115]See *VTB*, *ibid* at para 143, Lord Neuberger.
[116]*Supra* note 67.

was considered to be an inherent right, whether or not it was socially desirable to do so.[117] Given the reliance by the Supreme Court in *Prest*[118] on *Adams*, the decision undoubtedly remains good law.

Secondly, direct duties may be used to challenge the structure where an attempt is made to establish a direct duty of care between the claimant and the parent company, bypassing the subsidiary. Such claims are distinct from veil-piercing, but are extremely rare[119] and offer little relief from a judgment-proof structure.

Thirdly, an attempt might be made to establish dual vicarious liability[120] of an asset-holding parent company (*i.e.* to establish that the parent company as well as the subsidiary company is vicariously liable for the subsidiary company's employee/volunteer). However, careful corporate structuring and policies will prevent such a claim from being successful, particularly if the parent company distances itself from the subsidiary's operations and does not involve itself with the subsidiary's employees or volunteers. That a parent company may be vicariously liable for a subsidiary company's torts[121] does not, at this stage of English legal development, offer relief to a claimant.[122] Nevertheless, there may be pressure to develop such claims, given the new highly restrictive approach to veil-piercing where judgment-proofing via a group structure is used to evade liability for egregious torts such as institutionalised sexual abuse, which may occur in VSOs associated with the provision of activities for children. Finally, where the subsidiary has dissipated wealth, this judgment-proofing strategy may also be disrupted through attempts to reverse the transactions through which the subsidiary has dissipated its wealth.[123]

Despite these potential challenges, a group structure still offers a viable mechanism for judgment-proofing VSOs. However, its viability is limited to more sophisticated entities and it is not appropriate for smaller community based VSOs. Furthermore, this strategy of judgment-proofing potentially exposes the directors of the undercapitalised company to personal liability.[124] This is shifting the risk from the entity to its officers and directors — who may be unpaid volunteers.

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[117] *Ibid* at 544.
[118] *Supra* note 114 at paras 21-22, Lord Sumption.
[119] *Lubbe v Cape Plc*, [2000] UKHL 41; *Connelly v RTZ Corp Plc*, [1999] CLC 533 (QB (Eng)) (strike out, duty of care was arguable); *Ngcobo v Thor Chemicals Holdings Ltd*, [1995] EWCA Civ J1009-1; *Vedanta Resources Plc v Lungowe*, [2019] UKSC 20 (jurisdictional challenge, duty of care was arguable). Whilst successful in *Chandler v Cape Plc*, [2012] EWCA Civ 525, it is easily evaded. *Thompson v The Renwick Group Plc*, [2014] EWCA Civ 635 demonstrates that a duty will not be imposed where the parent company acts as a holding company. See also *Okpabi v Royal Dutch Shell Plc*, [2018] EWCA Civ 191; *AAA v Unilever Plc*, [2018] EWCA Civ 1532.
[120] See *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2005] EWCA Civ 1151; *Various Claimants*, *supra* note 42.
[121] Phillip Morgan, "Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?" (2015) 31 Journal of Professional Negligence 276; Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape Plc" (2013) 76:3 Modern Law Review 603.
[122] See generally William Rands, "Domination of a Subsidiary by a Parent" (1999) 32 Indiana Law Review 421 at 443-46 (such claims have been allowed in the US, but these are mostly veil-piercing cases rather than true vicarious liability cases).
[123] *Insolvency Act*, *supra* note 107, ss 238, 423; See John Armour, "Transactions at an Undervalue" in John Armour & Howard Bennett, eds, *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003) at 37, 97.
[124] See *Insolvency Act*, *ibid*, ss 212, 214.

IX. Voluntary Sector Specific Concerns Towards Judgment-Proofing

Now that we have established that judgment-proofing is available to VSOs, and that it may offer significant protection to the voluntary sector from liabilities in tort, we must now address voluntary sector specific concerns towards judgment-proofing. Given that so far the discussion of judgment-proofing within the literature concerns for-profits, these voluntary sector issues have not yet been discussed.

A. Voluntary Sector Reputation

Being seen to utilise clever structuring to avoid paying for the consequences of liability may have reputational consequences for a VSO.

Maintaining a high reputation is important to a VSO's and the broader voluntary sector's ability to discharge a number of the sector's roles, particularly the sector's ability to speak truth to power, and in providing public goods. Judgment-proofing creates a reputational risk for VSOs since a deliberate strategy of judgment-proofing deprives tort victims of their remedies, requiring them to fall back on their own resources, the welfare state, and charity. It is also possible that the use of judgment-proofing may imperil the high reputation that the voluntary sector itself enjoys.

Industries in which judgment-proofing has been used, such as the asbestos and tobacco industry, may have little concern about their public image when compared with the voluntary sector. Nevertheless, even within such industries, attempts to judgment-proof may also face other external pressures such as governmental and union pressure, public inquiries, as well as negative publicity, which ultimately forces the asset holding entity to provide more capital to meet compensation claims, as has been experienced with asbestos manufacturing in Australia.[125] Where there is widespread use of judgment-proofing the legislature may intervene; for instance, as with environmental legislation in the US in response to widespread use of poorly capitalised subsidiaries in the waste disposal industry[126] or in the UK with pension liabilities.[127]

With the voluntary sector, the public relations consequences of judgment-proofing may be more pronounced than for-profits. Where a VSO relies on government funding or contracts, its use of judgment-proofing may lead to the loss of opportunities if the entity develops a reputation for irresponsible risk-taking. It may also lead to greater regulation of the sector. This is particularly so if tort claimants attempt to target the state or local authority directly, in an attempt to bypass a judgment-proof VSO. A poor reputation may also lead to a decline in donations and volunteers and the loss of influence at the local and national policy making level.[128] High levels of public trust and confidence are required if the sector is to effectively speak truth to power.

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[125]Peter Cane & James Goudkamp, *Atiyah's Accidents, Compensation and the Law*, 9d (Cambridge: Cambridge University Press, 2018) at 217.
[126]See *e.g. The US Comprehensive Environmental Response, Compensation, and Liability Act*, 42 USC § 9601 et seq (1980).
[127]See *e.g. Pensions Act 1995* (UK), c 26, s 75 [*Pensions Act*].
[128]See Lytton, *supra* note 42.

B. Public Relations Examples

The reported English cases on clerical sexual abuse, so far, reveal no attempt to have been made by the Roman Catholic Church in England to rely on judgment-proofing, despite the fact that due to an accident of history, the Church is structurally judgment-proof in England. The litigation, so far, has instead primarily been contested on the scope of vicarious liability.[129]

Whilst a Diocesan Bishop of the Roman Catholic Church may be vicariously liable for a Diocesan Priest,[130] on the basis that they are in a relationship "akin to employment",[131] the Bishop is not a corporation sole in English law, unlike in the Anglican Church. There is thus no legal continuity as a matter of civil law between successors in the office.

Essentially, this means that a Bishop appointed in the 2010s is being held liable for the "akin to employment"[132] relationship that was exercised by his (often now dead) predecessor over a priest of the diocese in the 1970s, a time when the Bishop might not even have been ordained as a priest. As a matter of law, this simply cannot be correct. Further, the Bishop is being sued in a personal capacity — in his own name. His own assets and estate are being exposed. Whilst the institution and its insurers are currently backing 'their man', he does not own the assets of the Diocese. The assets will be held in various charitable trusts, which may be incorporated, and/or held by various trustees. Again, the identity of the trustees may be different to those at the time of the alleged abuse.[133]

The institution of a Roman Catholic Diocese is a creature of Roman Catholic Canon law, which is not recognised by English common law. It therefore exists at law, if at all, as an unincorporated association. For there to be an unincorporated association there is a need for a contract between each and every member.[134] Whilst such contracts are easily found,[135] the characterisation of a Diocese as an unincorporated association may be disputed since an unincorporated association requires a contract between members, and the desire for the relationship between members to be governed by Roman Catholic Canon law may mean that there is no intention to create legal relations as a matter of the English law of contract.

That reliance on such a defence, which is perfectly valid as a matter of law, may be a public relations disaster is demonstrated by the experience in New South Wales. In *Trustees of the Roman Catholic Church v Ellis*,[136] a claim brought against Cardinal Pell, Archbishop of Sydney, was struck out. The claims related to abuse committed by a priest between 1974 and 1979. Cardinal Pell had no relevant connection with the Sydney Archdiocese prior to 2001. Further, the claims brought against the Diocesan trustees in *Ellis* were also unsuccessful,

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[129]See *e.g. Maga v Archbishop of Birmingham*, [2010] EWCA Civ 256; *JGE*, *supra* note 42.
[130]*JGE*, *ibid*.
[131]*Ibid* at para 18.
[132]*Ibid*.
[133]There are allegations that the changing identity of trustees has been utilised as a litigation device at the issuing stage, see generally Justin Levinson, "Tactics in Child Abuse Claims against the Catholic Church", Personal Injury Focus, *1 Crown Office Row* (September 2006) online: <www.preview2.1cor.enstar.net/1158/section.nc?startpointt1164i23=50&form_1105.replyids=wmocztgus&startpointt1159i19=280>.
[134]*Conservative and Unionist Central Office v Burrell*, [1982] 1 WLR 522 (CA (Eng)) at 525.
[135]Nicholas Stewart, Natalie Campbell & Simon Baughan, *The Law of Unincorporated Associations* (Oxford: Oxford University Press, 2011) at 12.
[136][2007] NSWCA 117 (Austl) [*Ellis*], permission to appeal to the HCA refused, [2007] HCATrans 697.

since they were property holders only, and were well-removed from the management, appointment, or oversight of priests.[137]

As a matter of law, the defence was conducted entirely properly. However, the decision in *Ellis* has gained notoriety and much negative media publicity for the Roman Catholic Church both in Australia and internationally. The Archdiocese of Sydney had to issue a public declaration that it "has not organised its affairs to avoid its responsibilities to victims" and that it subsequently provided Mr. Ellis with financial assistance.[138]

There is increasing pressure at both the Governmental and Parliamentary level in Australia for reform. A Parliament of Victoria inquiry was highly critical of the position taken by the Roman Catholic Church, rejecting Cardinal Pell's insistence that the Church had not relied on a 'legal technicality', and declaring that there was tension between a commitment to justice and such defences, and that government intervention was necessary. The Committee recommended that nominal defendants be used in such cases.[139] In May 2014, the Government of Victoria accepted this recommendation in principle.[140]

Cardinal Pell also faced critical cross examination in relation to the *Ellis* case before Australia's Royal Commission into Institutional Responses to Child Abuse,[141] where the Archdiocese's internal litigation correspondence was publicly exposed. Cardinal Pell felt it necessary to make a public apology for his handling of the case.[142] The Royal Commission, in its final report, recommended that legislation should be introduced at state level so that where sexual abuse litigation concerns an institution:

> with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings: a. the property trust is a proper defendant to the litigation, b. any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.[143]

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[137]See generally *Doe*, *supra* note 42 at para 12 (related, but unsuccessful, arguments have been run in Canada, although this was in the context of a statutorily created corporation sole).

[138]Catholic Archdiocese of Sydney, "The Ellis Decision — a Re-statement of the Law" (14 September 2015), online: *Catholic Archdiocese of Sydney* <www.sydneycatholic.org/justice/royalcommission/ellis.asp> in Key Facts.

[139]Austl, Commonwealth, *Betrayal of Trust, Inquiry in the Handling of Child Abuse by Religious and Other Non-Government Organisations*, Parl Paper No 275 (2013) at 511-12.

[140]Government of Victoria, "Victorian Government Response to the report of the Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations '*Betrayal of Trust*'", online (pdf): *Government of Victoria* <www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Government_Response_to_the_FCDC_Inquiry_into_the_Handling_of_Child_Abuse_by_Religious_and_Other_Non-Government_Organisations.pdf>.

[141]See Austl, Royal Commission into Institution Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (Royal Commission, 2015) at 229-30.

[142]Catherine Armitage, "George Pell apologises to John Elllis [sic], but can't look at him" (27 March 2014), online: *The Sydney Morning Herald* <www.smh.com.au/nsw/george-pell-apologises-to-john-elllis-but-cant-look-at-him-20140327-35lo9.html>. See generally BBC, "George Pell: Cardinal found guilty of sexual offences in Australia" (26 February 2019), online: *BBC* <bbc.co.uk/news/world-australia-47366113> (Cardinal Pell has now himself been convicted of sex offences).

[143]Austl, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (Royal Commission 2017) at Recommendation 94; Austl, Royal Commission into

Victoria and New South Wales have now implemented this recommendation via the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018*[144] and the *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018*,[145] respectively. Western Australia has dealt with *Ellis* via the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018.*[146] Other jurisdictions appear to be following suit.

The lesson to be learned from *Ellis* is that reliance on judgment-proofing defences by a VSO may lead to highly damaging publicity. It may also lead to legislative attempts to close the door upon the use of such structures.

Nevertheless, care must be taken with this case study. The claim in tort related to institutional child abuse, and this is very different to ordinary negligence. The values of Christianity and the Roman Catholic Church, and the expected conduct of its adherents, may also have influenced the public perception of the way in which the litigation was conducted. A secular organisation, such as the Scouts, may be perceived in a different light. Further, even when the Roman Catholic Church has defended such claims on other grounds — for instance, on points relating to the scope of vicarious liability — it has still faced negative publicity for its actions. Because of the size and scope of the voluntary sector, there is a plurality in the nature of the services that are offered, the species of tort, and the conduct underlying the tort. This makes the issue of public relations and public perception complex. A person who strains their wrist whilst spinning a tombola drum at a village fete is in a very different class to the victims of systematic institutional abuse of minors.

In other cases, the use of judgment-proofing mechanisms to attempt to defend assets from claims has generated public support. Whilst not a tort case, an attempt was made to protect the Wedgwood collection and museum from claims relating to group pension liabilities.[147] In this case, the failed attempt to assert the existence of a structure (separate incorporation) designed to protect assets against claims generated considerable public support and inspired a successful public campaign, resulting in The Heritage Lottery Fund, The Art Fund, as well as other trusts, saving the museum's collection for the nation.[148] Further with the *Christian Brothers* litigation the attempt to defend the assets of the schools in British Columbia was politically popular, particularly since the abuse occurred in a province thousands of miles away, and was entirely unconnected with the schools.[149] Indeed, after the decision was handed down by the Court of Appeal of Ontario, the Legislative Assembly of British Columbia expressly legislated against the decision.[150] These examples demonstrate that

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Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission 2015) at 496-509.

[144](Vic), 2018/18.

[145](NSW), 2018/56.

[146](WA), 2018/13.

[147]See *Wedgwood*, *supra* note 81. *Pensions Act*, *supra* note 127, s 75 bypassed the mechanism of separate incorporation, which was used to protect the Wedgwood collection and museum from potential adverse trading conditions. The museum, as last man standing, had to foot the bill of the entire Wedgwood Group's pension deficit.

[148]BBC, "Wedgwood collection 'saved for nation'" (3 October 2014), online: *BBC* <www.bbc.co.uk/news/uk-england-stoke-staffordshire-29460282>.

[149]Paul Schratz, "Long Ago, Far Away Abuse May Close Canadian Schools" (21 July 2002), online: *National Catholic Register* <www.ncregister.com/site/article/long_ago_far_away_abuse_may_close_canadian_schools/>.

[150]*Charitable Purposes Preservation Act*, SBC 2004, c 59. This Act, whilst retrospective, did not affect the settlement with the liquidator in relation to the schools per subsection 6(2).

whilst the use of judgment-proofing structures has the potential to damage the reputation of the sector, not all such uses will necessarily do so.

C. Reduced Volunteering?

Volunteers are the life-blood of the voluntary sector. If a judgment-proof VSO cannot be viably sued for its wrongs or the wrongs of its 'agents', then if victims are not to go uncompensated, claims, which might otherwise have been brought against the VSO, may instead be brought against its volunteers.

Whilst many volunteers will not have sufficient assets or insurance to meet a non-driving-related tort claim, and even where they do, it may be more difficult to sue them when compared to organisations[151] volunteers may place their own assets at risk when they volunteer for judgment-proof VSOs. Judgment-proofing would also protect VSOs against their own volunteers' claims where they are injured through the organisation's negligence.

Whilst claims against volunteers may be rare, particularly where they are uninsured, English law does not prevent such claims, and VSO judgment-proofing encourages it. We have seen above that there is evidence that tort law deters volunteering. Judgment-proofing increases tort's deterrent effect on volunteers and increases the cost of volunteering. This may over-deter volunteers[152] and lead to a reduction in volunteering or a diversion of volunteer efforts away from judgment-proof VSOs towards VSOs which are not judgment-proof. Whilst volunteers may be able to spread this cost through personal insurance policies, these premiums still represent an increase in volunteering costs and formality, which points towards reduced volunteering.

VSOs with a reputation for judgment-proofing may lose volunteers, a relevant factor in deciding whether or not to adopt judgment-proofing. However, since many volunteers will not be aware of the insurance and judgment-proofing status of the VSO for which they volunteer, there is a risk that high profile incidents of judgment-proofing resulting in individual volunteers being sued in a personal capacity, may damage the reputation of the whole sector, and impact volunteering levels across the sector.

X. Conclusion

Whilst some scholars have doubted the existence of judgment-proofing, this article demonstrates that judgment-proofing is a real phenomenon, particularly in high risk industries. Judgment-proofing may also be tempting to VSOs concerned with insurance costs, or protecting assets from large claims, or branching out into new and potentially hazardous areas of services. It is possible to create a judgment-proof structure within the voluntary sector by using charitable trusts and/or corporate group structuring. Such devices are used to generate a structure whereby the risk-generating elements of a VSO hold insufficient assets to meet claims. The VSO makes itself a man of straw whilst continuing to have access to and use of the assets, allowing it to have its cake and eat it.

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[151]See Robert Heidt, "The Unappreciated Importance, For Small Business Defendants, Of The Duty To Settle" (2010) 62 Maine Law Review 75 at 92; Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" (2001) 35:2 Law & Society Review 275.
[152]Gilles, *supra* note 62 at 682.

Although using judgment-proofing is not fool-proof, and may face legal challenges, it may provide significant asset protection and discourage claims, allowing the organisation to externalise its accident costs. This will leave the loss to fall on victims or individual volunteers. Nevertheless, the widespread use of judgment-proofing mechanisms by VSOs may create pressure on legislatures and the courts to generate new legal solutions to get around such structures in egregious cases; for instance, by expanding direct duties of care, expanding the law of vicarious liability, re-writing the law of trusts (as in Ontario), or the creation of special legislative mechanisms (as in Australia).

There are also a number of sector-specific concerns in relation to judgment-proofing. The use of judgment-proofing to evade paying for liabilities can generate reputational concerns for VSOs. Whilst the use of such mechanisms is not universally condemned, the use of such structures to evade paying for tort liabilities has generated negative commentary in some cases. Such structures may threaten the reputation of the sector, which, as well as impacting on donations and volunteering levels, may impact the public role and prominence of the sector, and its ability to speak truth to power. Public discourse is enriched by the sector's ability to draw upon its unique knowledge and experience. Maintaining the sector's reputation is important in facilitating its ability to meet demands for public goods and its ability to contribute towards government accountability.

Whilst VSOs may construct organisational protection from tort through judgment-proofing mechanisms, it comes at a cost both for the VSO itself (above and beyond the costs of constructing and administering the judgment-proofing scheme), and for the sector as a whole.